Justice Powell's Garden: The *Ciraolo* Dissent and Fourth Amendment Protection for Curtilage-Home Privacy

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* Geoffrey C. Bible & Murray H. Bring Professor of Constitutional Law, Tulane Law School. The first draft of this article focused on Justice Powell's curtilage opinion in *Oliver v. United States*, 466 U.S. 170, 180 (1984). For her inspiring suggestion to take a closer look at the *Ciraolo* dissent, I want to thank one of my Criminal Procedure Forum colleagues, Professor Anne M. Coughlin, a former law clerk for Justice Powell, and now O. M. Vicars Professor of Law and Barron F. Black Research Professor at the University of Virginia School of Law. For very helpful conversations and encouraging words, I am also grateful to another Forum participant, my colleague Jancy Hoeffel. For his helpful assistance with research, I want to thank Andrew Flood ('08).

I. INTRODUCTION

The garden is a busy place in Fourth Amendment lore, for it is the site of recurring attempts by police officers to investigate criminal activity free from the constitutional restraints of the probable cause and warrant requirements. The target of police intrusions may be the garden itself, the interior of the home beyond the garden, or the opportunities for discoveries to be made in both locations. In 1986, the Supreme Court divided five to four in *California v. Ciraolo*,[1] holding that police officers did not perform a constitutional "search" or "seizure"[2] when they used an airplane to fly over an enclosed backyard, in order to look into the garden of a particular householder from 1000 feet in the air. The officers spied incriminating evidence in that garden, which supplied the probable cause needed to obtain a warrant that allowed a search of both the yard and the house.[3] The Court concluded that the householder could have no "reasonable expectation of privacy"[4] from aerial police surveillance, because any member of the public "could have seen everything"[5] that the police officers observed, when flying at the same low altitude over the house and yard. The plants in the garden were "readily discernible to the naked eye as marijuana," and the Court viewed the officers' aerial position as a "public vantage point," similar to that obtained by travel upon "public thoroughfares."[6] Therefore, the Court determined that the householder "knowingly exposed" his enclosed backyard to the police; it was irrelevant that the officers, unlike the flying public, were conducting a targeted search for marijuana plants that they were trained to recognize.[7]

It was not surprising that the majority opinion in *Ciraolo* provoked an impassioned dissent. The decision was unprecedented in sanctioning aerial surveillance as a police strategy for evading Fourth Amendment prohibitions of surveillance on the ground.[8] The officers rented a plane because they did not have probable cause to obtain a warrant to enter and search the backyard, and because their attempts to peer into the yard were stymied by a tall fence.[9] They could not crawl over the fence because that intrusion would violate the householder's protected expectation

1. 476 U.S. 207 (1986).
2. These Fourth Amendment terms of art should be treated as having quotation marks throughout this Article.
3. *Ciraolo*, 476 U.S. at 216 n.1 (Powell, J., dissenting).
4. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).
5. *Ciraolo*, 476 U.S. at 213–14.
6. *Id*. at 213.
7. *Id.*
8. *Id.* at 225 n.9 (Powell, J., dissenting).
9. *Id.* at 209 (majority opinion).

of privacy in his "curtilage," the Fourth Amendment buffer zone of land associated with the "sanctity" of a dwelling and the "privacies" of home life.[10] Even in the absence of a high fence around the yard, the officers could not have crossed a smaller curtilage marker, such as a mow-line around a manicured lawn, in order to inspect the garden or peer into the windows of the house.[11] With the curtilage boundary as the first constitutional line of defense for both the yard and the home, the police would never get to the windows without a warrant or exigent circumstances.[12] Yet, the *Ciraolo* Court implicitly discarded the "personal and societal values" embodied in the curtilage barrier on the ground, by making the judgment that the same values did not justify the protection of the same home and garden privacy interest from a different point of police access.[13]

What was surprising about *Ciraolo* was that Justice Powell authored the dissent, joined by Justices Brennan, Marshall, and Blackmun. Before *Ciraolo*, Powell had authored the opinion in *Oliver v. United States*, holding that no expectation of privacy could attach to land outside the curtilage, no matter how many "No Trespassing" signs a householder had posted on that land.[14] Moreover, Powell agreed with the outcome reached in 95% of 133 search and seizure cases decided during his tenure on the Court.[15] He wrote only two Fourth Amendment dissents in twenty-five years, and one of them was in *Ciraolo*.[16] Powell's abandonment of his role as conservative centrist in order to

10. Oliver v. United States, 466 U.S. 170, 180 (1984) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)). *See, e.g.*, United States v. Van Dyke, 643 F.2d 992, 993–94 (5th Cir. 1981) (holding officers violated curtilage by climbing fence).

11. *See, e.g.*, United States v. Reilly, 76 F.3d 1271, 1279 (2d Cir. 1996) (finding officers violated curtilage by entering lawn); State v. Ross, 959 P.2d 1188, 1190 (Wash. Ct. App. 1998) (approving entry of curtilage when officers imitated normal conduct of social visitors).

12. *See* Payton v. New York, 445 U.S. 573, 585–87 (1980); *cf.* United States v. Whaley, 781 F.2d 417, 418–19 (5th Cir. 1986) (holding that entry upon curtilage land to inspect suspicious plants visible from outside curtilage violated Fourth Amendment).

13. *Ciraolo*, 476 U.S. at 212 (quoting *Oliver*, 466 U.S. at 182–83). After Powell retired from the Court, the Court decided another curtilage flyover case. *See* Florida v. Riley, 488 U.S. 445 (1989).

14. *Oliver*, 466 U.S. at 180 (labeling all land outside the curtilage as unprotected "open fields" subject to police entry and visual surveillance).

15. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 571 (2001). By contrast, Justices Marshall and Brennan agreed with the Court's outcome in only 40% of these decisions. *Id.*

16. *See also* Dow Chem. Co. v. United States, 476 U.S. 227, 240 (1986) (Powell, J., dissenting) (companion case to *Ciraolo*). Justice Powell frequently authored concurring opinions in Fourth Amendment cases, while voting with the majority or plurality.

dissent was one measure of the controversial nature of the *Ciraolo* decision.[17]

A notable achievement of the *Ciraolo* dissent was Powell's clarification of the relationship between the curtilage doctrines and the expectation of privacy analysis inaugurated in *Katz v. United States*.[18] At the outset, Powell's opinion articulated a set of first principles to explain how the underlying purposes of Fourth Amendment protections are grounded in the liberty interest in freedom from surveillance.[19] Powell recognized curtilage and home privacies as a single Fourth Amendment concept,[20] functioning within the framework of expectation analysis, and in turn, informing the application of that analysis. He viewed the entire web of decisions relating to a particular type of police intrusion as relevant to expectation analysis concerning that intrusion.[21] His *Ciraolo* dissent foreshadowed the interpretations of *Katz* and commitments made to privacy in *Kyllo v. United States*,[22] and displayed a similar dedication to the effort to protect householders from police intrusions made possible by advancing technology.[23] In the end, Justice Powell's opinion served as an invitation to reimagine the judicial dialogue that may be used to debate the necessities for protections against police intrusions that occur either inside or outside our gardens.

Part II.A of this Article describes Justice Powell's first principles that framed his judgments in *Ciraolo*, and explores their significance by comparing them to the majority's premises. Part II.B focuses on Powell's explication of the *Katz* framework and its relationship to the curtilage-home privacy doctrines established before *Katz*. Part III describes the defining moments for the back story of *Ciraolo*. Part IV presents speculations as to how Justice Powell would have resolved privacy issues in cases after *Ciraolo*, based on the views in his dissent.

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17. When almost 3000 decisions during Powell's tenure were sorted into twenty-one categories, it turned out that Powell agreed with the Court's outcome in 90% or more of the cases in thirteen categories, and in 80% or more of the cases in six categories. JEFFRIES, *supra* note 15, at xi, 571–72. *See also id*. at 533 (noting that the Burger Court of the 1970s and 1980s "might more accurately be called the Powell Court" because Powell was "probably its single most influential member").

18. *See Ciraolo*, 476 U.S. at 219–20, 223 (Powell, J., dissenting) (discussing implications of Katz v. United States, 389 U.S. 347 (1967)).

19. *Id.* at 217–19, 225–26.

20. *Id*. at 217–21.

21. *Id.* at 219–20.

22. 533 U.S. 27, 40 (2001) (holding that thermal imager violates expectation of home privacy).

23. C*ompare id*. at 34–35, *with Ciraolo*, 476 U.S. at 218–19 & n.3 (Powell, J., dissenting).

II. THE ANATOMY OF JUSTICE POWELL'S *CIRAOLO* DISSENT

A. First Principles for Articulating Fourth Amendment Liberties

Justice Powell's polestar for his Fourth Amendment compass was the Framers' political "choice" to create a society in which "citizens" enjoy legal protections of the right to "dwell in reasonable security and freedom from surveillance."[24] These protections were not the maligned refuge of lawbreakers, but rather, the historic methods by which law enforcement practices were intended to be limited or prohibited,[25] "in order to prevent 'any stealthy encroachments' of our citizens' right to be free of arbitrary official intrusion."[26] Furthermore, the constantly improving investigative capabilities of police officers established a dominant Fourth Amendment priority—the need to construct new legal protections for security and freedom in place of outdated and ineffective ones.[27]

To guide courts in this task of designing new doctrinal safeguards against the evolving forms of Fourth Amendment harms, Justice Powell offered two insights. First, the *Katz* question—Is there a reasonable expectation of privacy?—was the place to start the dialogue about these designs.[28] This dialogue should incorporate the study of pre-*Katz* decisions, especially the opinions that explained the ways to construct new measures of Fourth Amendment harms in place of the obsolete and highly fictionalized "physical trespass" formula, which had obstructed the Court's recognition of wiretapping as a search and seizure.[29] Second, the ultimate abandonment of that formula in *Katz* embodied the Court's commitment to discard doctrines that provided "no real protection" for

24. *Ciraolo*, 476 U.S. at 217 (Powell, J., dissenting) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)).
25. *See id.* at 226 n.11.
26. *Id.* at 217–18 (quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).
27. *Id.* at 217 (reasoning that "contemporary norms and conditions" must guide the task of updating the definition of searches and seizures).
28. *Id*. at 218.
29. *Id.* (citing Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting); Goldman v. United States, 316 U.S. 129, 139–41 (1942) (Murphy, J., dissenting)). *See also Ciraolo*, 476 U.S. at 220 (Powell, J., dissenting) (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

security and liberty,[30] and to replace these castoffs with doctrines tailored to match the relevant new incarnations of surveillance.[31]

Powell's second insight derived from his perception that the physical trespass formula served a protective function in an era when walls were reliable barriers, and when intrusions could not be performed without the proximate presence of visible, tangible, recognizable, official intruders. But that function eroded with the arrival of devices that empowered officers "to see people's activities and associations, and to hear their conversations, without being in physical proximity."[32] Therefore, the significance of the *Katz* Court's abandonment of the physical trespass formula had little to do with an aversion to property law, and everything to do with the failure of the formula to address the harms of "silent and unseen invasions" of privacy rights.[33] The officially approved replacement for the physical trespass formula became the requirement of a reasonable expectation of privacy, which reshaped the definitions of searches and seizures with a focus on "the interests of the individual and of a free society."[34]

What was notable about Powell's first principles? He recognized the richness of the privacy concept by affirming its dimensions of "security" and "freedom," and similarly translated the old-fashioned, literalistic terms, searches and seizures, into "surveillance." These rhetorical choices echoed the language of Fourth Amendment precedents before and after *Katz*, and captured Powell's vision of the privacy interest at stake in *Ciraolo*.[35] The connotation of *security* delivered a portrait of the psychological states of feeling safe from danger and fear, while the concept of *freedom* conjured images of behavior, such as ease of movement, frankness of speech, and the power to act without subjection to the power of the government.[36] By contrast, the term *privacy* may

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30. *Ciraolo*, 476 U.S. at 218 (Powell, J., dissenting) (explaining the need to provide "real protection against surveillance techniques made possible through technology").

31. *See id.* at 218 & n.3 (citing *Goldman*, 316 U.S. at 139 (Murphy, J., dissenting) (declaring that "the privacy of the citizen is equally invaded" by "new methods" of surveillance "that penetrate walls and overcome distances" as by "the direct and obvious methods of oppression which were detested by our forbears")).

32. *Id.* at 218.

33. *Id.* at 226. *See also* United States v. United States District Court, 407 U.S. 297, 315–21 (1972) (requiring warrants for domestic wiretapping surveillance program).

34. *Ciraolo*, 476 U.S. at 223 (Powell, J., dissenting).

35. *See id*. at 226 (quoting Boyd v. United States, 116 U.S. 616, 630 (1885)) (explaining the essence of Fourth Amendment violations as including "the invasion" of the rights of "personal security" and "personal liberty"). *See also* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 344–48 nn.255–57, 276 (1998) (citing cases).

36. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1575 (4th ed. 2000), *available at* http://dictionary.reference.com/browse/security (last visited

connote the narrower senses of its Shakespearian era origins, including conditions of seclusion, concealment, and isolation from the sight and presence of others, from their intrusions or disturbances, or from their access to knowledge of one's personal matters.[37] The difference between privacy conceived as liberty or security and privacy conceived as concealment was reflected in the contrasting characterizations of the defendant's experience in *Ciraolo*. As the Court described it, Ciraolo's expectation was the "hope that no one would observe his unlawful gardening,"[38] but for Powell, Ciraolo's expectation was the desire to enjoy life outside "in his backyard," a "family area," containing "a swimming pool and a patio for sunbathing and other private activities."[39] Powell saw Ciraolo as speaking for all people with backyards, who wish to live under the "open air and sunlight,"[40] not hidden away in their houses or under large tents, but secure in the peace and intimate atmosphere of an afternoon family picnic or a solitary swim in the nude.

Powell's use of the term *surveillance* captured the special connotation of police gathering of data, deriving from its origins as "seemingly a word of the Terror in France."[41] While the *Ciraolo* majority ignored Powell's use of the terms security and freedom, his use of the terms *surveillance* or *aerial surveillance* was contested in a tug of words that demonstrated the emotional power of Powell's vocabulary.[42] Chief Justice Burger substituted the terms *observation* or *aerial observation* to

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Sep. 5, 2007) (security); DICTIONARY.COM UNABRIDGED, http://dictionary.reference.com/browse/freedom (last visited Sep. 5, 2007) (freedom).

37. *See* 12 THE OXFORD ENGLISH DICTIONARY 515 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989), *available at* http://dictionary.oed.com/cgi/entry/"privacy" (last visited Sep. 5, 2007) (privacy); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1396 (4th ed. 2000), *available at* http://dictionary.reference.com/browse/privacy (last visited Sep. 5, 2007) (same).

38. *Ciraolo*, 476 U.S. at 212.

39. *Id*. at 222 & n.7 (Powell, J., dissenting).

40. *Id.* at 225 n.10. *Compare id.* ("[A]fter today, families can expect to be free of official surveillance only when they retreat behind the walls of their homes."), *with* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 402 (1977) (arguing that the Fourth Amendment should not require people to seek protection from surveillance "by retiring to the cellar" or permit people "to be driven back into the recess of their lives by the risk of surveillance").

41. *See* ONLINE ETYMOLOGY DICTIONARY, *available at* http://www.etymonline.com/index.php?term=surveillance (last visited Sep. 5, 2007) (surveillance); *id.* (noting French origin as *surveiller*); DICTIONARY.COM UNABRIDGED, http://dictionary.reference.com/browse/surveillance (last visited Sep. 5, 2007) (surveillance).

42. *Ciraolo*, 476 U.S. at 216–26 & nn.3, 10 (Powell, J., dissenting) (using the terms *surveillance* or *aerial surveillance* at least twenty times).

serve as neutral descriptions of the flyover, invoking an aura of passive conduct unrelated to police status, implicitly equating the actions and powers of police officers with those of anyone else.[43] Burger also implicitly disputed Powell's use of the term *surveillance* to include all acts of police collections of data, by rejecting the notion that visual detection practices, such as aerial monitoring of backyards, could be viewed as posing similar dangers to privacy interests as aural detection practices, such as the electronic monitoring of telephone calls prohibited by *Katz*. In Burger's view, the *Katz* Court's concern with devising protections from the nonphysical police intrusions could not have been "aimed at" the police practice of "simple visual observations from a public place," which is how he characterized the flyover inspection in *Ciraolo*.[44]

Other conflicts between Powell's first principles and the *Ciraolo* majority's premises could be characterized as differences of perspective that produced completely different frames for the *Ciraolo* problem. Burger assumed that Powell's fears about the dangers of stealthy intrusions of advancing technology could be set aside, because the *Katz* Court would not have considered aircraft to be "electronic" devices, or viewed "flight in the public airways" as anything but "routine."[45] Similarly, Burger brushed off Powell's concern about the need for protections against "broad and unsuspected governmental incursions" into "cherished privacy" of large numbers of "law-abiding citizens."[46] During the flyover, the officers photographed not only Ciraolo's yard, including his pool and patio as well as his garden, but also his home, and the homes and yards of his neighbors. Powell characterized this conduct as "indiscriminate" surveillance,[47] as a reminder that officers performing an airborne mission to photograph a particular backyard would not be likely to avert their eyes from their view of all the curtilages and homes on their aerial route. But the significance of the photographic intrusions in *Ciraolo* was dismissed by Burger as irrelevant, because the photograph attached to the warrant

43. *Id.* at 209–16 & nn. 1, 3 (majority opinion) (using the terms *observe*, *observing*, *observation(s)*, or *aerial observation(s)* at least thirty times, while using the word *surveillance* only twice, once in reference to "electronic surveillance," and once in reference to "a method of surveillance").

44. *Id.* at 214 (concern with protection of telephone booth conversations about crime "does not translate readily" into concern with protection of backyard drug cultivation).

45. *Id*. at 215.

46. *Id*. at 218 (Powell, J., dissenting) (quoting United States v. United States District Court, 407 U.S. 297, 312–13 (1972)).

47. *Id.* at 225.

affidavit did not reveal the color of the suspect plants.[48] To the Court majority, police flyovers did not present a serious threat "to privacy interests in the home," and so could be allowed to "escape entirely" from "Fourth Amendment oversight" by the courts.[49] Powell considered both the Court's result and reasoning to be "flawed."[50] They "depart[ed] significantly"[51] from *Katz* expectation analysis, and they were "curiously at odds" with curtilage-home privacy doctrines.[52] For Powell, these were strong words.[53]

B. The Fifth Wall and the Second Ceiling: Powell's Understanding of Katz*'s Protection of Curtilage-Home Privacy*

Compared to Powell's exegesis of *Katz* and its relationship to pre-*Katz* precedents, Burger took a much simpler approach in *Ciraolo*. He resolved the privacy issue by relying mainly on a few post-*Katz* privacy decisions,[54] reducing the reasoning of each decision to a maxim or two, and applying the maxims by analogy to the police flyover. In Powell's eyes, however, Burger only purported to reaffirm the analytical framework of *Katz* with regard to the question whether "society was prepared to recognize" the protection of Ciraolo's privacy interest "as reasonable."[55] One flaw in the *Ciraolo* opinion was the failure to consider the appropriate factors for answering that question, as endorsed in a variety of precedents. A more complex flaw was the Court's unwillingness to recognize the validity of the operation of pre-*Katz* curtilage doctrines, and its tolerance for destabilizing the requirements of those doctrines through the use of the knowing exposure concept, interpreted expansively in post-*Katz* precedents but even more expansively in *Ciraolo*.

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48. *Id.* at 212 n.1 (majority opinion) (finding police testimony sufficient to support warrant, making it unnecessary to address relevance of photograph of curtilage to privacy issue).
49. *Id*. at 225 (Powell, J., dissenting) (quoting United States v. Karo, 469 U.S. 705, 716 (1984)).
50. *Id.* at 223.
51. *Id.* at 216.
52. *Id.* at 219.
53. *Id. See* JEFFRIES, *supra* note 15, at 559.
54. *Ciraolo*, 476 U.S. at 210–13 (citing Oliver v. United States, 466 U.S. 170 (1984); United States v. Knotts, 460 U.S. 276 (1983); Rawlings v. Kentucky, 448 U.S. 98 (1980); Smith v. Maryland, 442 U.S. 735 (1979)).
55. *Id.* at 219 (Powell, J., dissenting).

Powell's list of factors for assessing privacy expectations began with the determination of the "personal and societal values" at stake in the protection of curtilage from aerial surveillance.[56] The *Ciraolo* majority made passing reference to this point,[57] but then ignored the remaining factors on Powell's list, including the "understandings that are recognized and permitted by society,"[58] and the "societal understanding that certain areas deserve the most scrupulous protection,"[59] such as the home, which stands "at the very core of the Fourth Amendment,"[60] and in which a subjective expectation of privacy "virtually always will be legitimate."[61] Relying on *Oliver*'s recognition of the curtilage as "part of the home itself for Fourth Amendment purposes,"[62] Powell treated the curtilage as deserving the same "scrupulous" protection because of its inseparability from the home; without using the term *curtilage-home*, he consistently treated the two legal constructs as one.[63] Other factors on the list included the intention of the Framers, the uses to which a person has put a location,[64] and the common law generally,[65] including concepts of "real or personal property law."[66] The expectation for curtilage privacy qualified as "reasonable" in light of these sources. For example, the curtilage concept defined the scope of common law burglary,[67] and it was the area understood by the Framers to be associated with the intimate or domestic activity of the home.[68]

If Powell had authored a majority opinion protecting the privacy interest in *Ciraolo*, he could have rested his decision upon this list of factors and his first principles for interpreting *Katz*. Neither analytical foundation pointed to a distinction between a home dweller's ground-level expectations and aerial expectations of privacy that would justify a Fourth Amendment loophole for flyover inspections. Powell viewed the

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56. *Id.* at 220 (quoting *Oliver*, 466 U.S. at 182–83).
57. *Id.* at 212 (majority opinion) (citing *Oliver*, 466 U.S. at 181–83).
58. *Id.* at 220 n.5 (Powell, J., dissenting) (quoting Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978)).
59. *Id.* (quoting *Oliver*, 466 U.S. at 178).
60. *Id.* (quoting Silverman v. United States, 364 U.S. 505, 511 (1961)).
61. *Id.* (citing Payton v. New York, 425 U.S. 573, 589 (1980)); *see also id.* at 219 n.4 (writing that "legitimate" and "reasonable" are interchangeable terms).
62. *Id.* at 220 (quoting *Oliver*, 466 U.S. at 180).
63. It is easy to recognize the curtilage as a construct, but so is a home. *See* Robert J. Leibovich, Note, *Privacy Goes Camping: Staking a Claim on the Fourth Amendment*, 26 U. MEM. L. REV. 293, 303–14 (1995) (discussing cases addressing the question whether the Fourth Amendment protections of a home attach to a camping tent).
64. *Ciraolo*, 476 U.S. at 220 (Powell, J., dissenting) (citing *Oliver*, 466 U.S. at 178).
65. *Id*. at 217.
66. *Id.* at 220 n.5 (quoting Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978)).
67. Eric Dean Bender, Note, *The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 731–34 (1985).
68. *Oliver*, 466 U.S. at 180.

pre-*Katz* curtilage doctrines as establishing both an invisible fifth wall that prohibited the entry and presence of police in a backyard, and an invisible second ceiling that provided the equivalent protection from airborne police inspectors. In Powell's judgment, the curtilage concept created "real protection" against evolving police surveillance methods such as the flyover. Implicitly, he viewed curtilage doctrines as bearing no resemblance to the unprotective physical trespass doctrine abandoned by *Katz* in the electronic surveillance context.

Powell did not explain the significance of his disagreement with the Court's failure to use his list of factors to guide its decision. He let the cited sources for each factor speak for themselves, and they revealed his position that all Fourth Amendment privacy issues shared common ground. Precedents regarding warrant exceptions appeared as the source of authority for some of Powell's factors. He recognized what the majority declined to consider, which was that such precedents usually included evaluations of the strength or weakness of the privacy expectation that was assumed to exist in each case.[69] The particular significance of Powell's commitment to casting a wide net for ideas about privacy was that the warrant-exception decisions repeatedly emphasized the values of home privacy, thereby supporting his reasoning concerning the powerful need for protecting curtilage-home privacy in the context of aerial surveillance.[70]

The more general significance of Powell's position was that it reflected one of his first principles, that evolving police practices required the tailoring of new protections to match them. Powell recognized that the validation of a reasonable privacy expectation constituted a presumptive decision that the only adequate protection for that expectation consisted of the warrant and probable cause requirements. Therefore, the warrant precedents were necessarily relevant in recognizing how a privacy interest should be defined. Powell did not care to measure privacy in the abstract for its own sake. Rather, he wished to expose all the concerns that Fourth Amendment jurisprudence could contribute to a judgment about whether to require police officers to comply with warrant protections.

The implied position of the *Ciraolo* majority, considering the message presented by Burger's citations, was that the only significant authorities for determining the validity of a privacy expectation, as a threshold issue,

69. *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 6–13 (1977), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991).

70. *See, e.g.*, Steageld v. United States, 451 U.S. 204, 211–12 (1981); Payton v. New York, 445 U.S. 573, 589 (1980).

were other precedents resolving the same issue. This position restricted privacy analysis in two different ways. First, Burger's perspective dramatically narrowed the range of ideas that could inform a debate about the significance of allowing a particular unregulated intrusion to affect the lives of citizens in a free society. Second, his limited analysis magnified exponentially the precedential power of analogy-making as a determinant of results in privacy cases. With only privacy precedents on the table, in each new privacy case the courts would be forced to stretch potentially inapposite holdings to reach the new scenario. In this way, Burger's perspective endowed each anti-privacy precedent with greater influence than it would be accorded in Powell's analytical world. The *Ciraolo* majority's reasoning displayed each of these features of the closed world of privacy precedents. For example, Burger reasoned that the police conduct of visual surveillance on public streets, by means of tailing a suspect on foot or by car, so as to gain only the knowledge of her route, resembled a flyover in which police took photographs of a backyard that they were prohibited from inspecting at the ground level. By contrast, Powell recognized the value of expanding the dialogue of privacy debate beyond the similarity of Katz's phone booth to Ciraolo's garden.[71]

Powell explained his reasons for objecting to the more complex flaw in the *Ciraolo* opinion in some detail, and he candidly identified Burger's knowing exposure theory as a fiction that allowed judges to impose the risks of police surveillance on people whose activities were subject to public scrutiny.[72] After *Ciraolo*, those risks would fall on a broad class of mostly law-abiding people who wished to enjoy life outdoors in their yards.[73] Powell compared the claimed similarities between the risks actually taken by such home dwellers and the risks of police surveillance imposed in *Ciraolo*, and concluded that the Court's claim of equivalence was so implausible as to deserve rejection.[74] If Ciraolo's home were not located in a flight path for landing or takeoff, Powell regarded it as extremely unlikely that a traveler's plane could be flying at a sufficiently low altitude to see the garden.[75] He emphasized that a traveler would not be trained to recognize marijuana, would not know Ciraolo's identity, would have no reason to glance out the window except serendipitously, and would have only the briefest of opportunities

71. *See Ciraolo*, 476 U.S. 207, 214–15.
72. *Id*. at 224–25 & n.9 (Powell, J., dissenting).
73. *Id.* at 229 n.10.
74. *Id*. at 224–25. *Compare* Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 627–39 (1989) (explaining proposal for assessing risk of exposure for expectation analysis).
75. *Ciraolo*, 476 U.S. at 223 n.8 (Powell, J., dissenting).

to view the scene. Police officers in a flyover operation would exhibit none of these characteristics.[76] Thus, the Court's decision forced home dwellers without total tent coverage to accept an invasive risk of police surveillance as the consequence of choosing to live with an extremely remote risk of fleeting public scrutiny.

The *Ciraolo* majority, however, did not claim that the risk of public scrutiny was meaningful, only that it existed. Nor did the majority claim that the purposeful police officers and the clueless traveler constituted a similar risk. Chief Justice Burger simply treated the dissimilarities as irrelevant. By contrast to the candor and realistic assumptions underlying Powell's arguments, Burger's arguments possessed the character of hardened fictions that cannot be answered. The knowing exposure maxim had become the substitute for physical trespass, a barrier to the recognition of real privacy harms. The expectation inquiry no longer exhibited judicial sensitivity to personal and societal values, exemplified in *Katz*'s concern with the "vital role" of the telephone in "private communications,"[77] and pre-*Katz* concerns for the protection of the confidentiality of beliefs and thoughts.[78]

Powell's critique of the knowing exposure theory also included his objection to the incompatibility of that theory with curtilage doctrines. The fence around Ciraolo's backyard obscured more than the view of the police officers; it also obscured the point that for ground-level protection of the curtilage, no fence was necessary. Its existence was merely a factor enhancing the eligibility of the yard for curtilage status. Even without the fence, a police officer who wished to inspect a backyard would be tethered invisibly to the sidewalk. She would be free to exercise the power of plain view, but she could go no further, either to cross the curtilage boundary on foot, or to climb a tree or a ladder to get a better view, as Powell pointed out.[79] Yet nothing would prevent a passerby from entering a curtilage, other than the ire of the home dweller or threats of legal action when discovered. Thus, no equivalence existed between the ready access of the walking or tree-climbing public and the forbidden access of the officer. The curtilage-home privacy rules left no room for the application of a knowing exposure theory, but embodied

76. *Id.* at 223–24.
77. *See* Katz v. United States, 389 U.S. 347, 352 (1967).
78. *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 474, 478 (1928) (Brandeis, J., dissenting).
79. *Ciraolo*, 476 U.S. at 222 (Powell, J., dissenting) (citing cases).

the opposite perspective that police officers and curious passersby had nothing in common. The unique police threat of surveillance on the ground would never be conflated with the risk of intrusions by random unwelcome visitors without a badge. Paradoxically, the *Ciraolo* majority decided that the curtilage taboo that kept police officers from climbing trees should not keep them from hovering at a somewhat higher distance where the access of curious passersby was "virtually nonexistent."[80]

The *Ciraolo* majority also managed to perpetuate a sense of uncertainty about the application of the *Katz* framework in the curtilage-home context. Powell treated the undisputed finding that Ciraolo's yard qualified as curtilage as sufficient proof of his subjective manifestation of a privacy interest required by *Katz*.[81] Similarly, after noting that it was unnecessary for the Court to address the manifestation issue, Burger added that Ciraolo had "met the test of manifesting his own subjective intent and desire to maintain his privacy."[82] But then, Burger found it "not entirely clear" whether Ciraolo had manifested his expectation "from *all* observations of his backyard," pointing out that a citizen or police officer "perched on the top of a truck or a two-level bus" might observe the plants in the garden.[83] Yet if Ciraolo did not adequately manifest his expectation from aerial observation, there was no need to address the question whether his expectation was reasonable. Burger also noted that it would be unreasonable for Ciraolo to assume "his unlawful conduct w[ould] not be observed" by "a power company repair mechanic on a pole overlooking the yard."[84] By these observations in dicta, Burger not only minimized the significance of the State's concession that the backyard qualified as curtilage,[85] but also implied that officers might gain lawful visual access to curtilage whenever their feet left the ground, in spite of curtilage rules to the contrary.

The *Ciraolo* majority thus provided ambiguous signals to lower courts, although it was clear that home dwellers now possessed no reasonable expectation of privacy from naked-eye surveillance of curtilage land during flyovers at 1000 feet—a holding that was extended later to helicopters at 400 feet.[86] Perhaps the Court's reasoning also implied that

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80. *Id.* at 223.
81. *Id.* at 213 (majority opinion).
82. *Id*. at 211.
83. *Id.* at 211–12.
84. *Id.* at 214–15.
85. *Id.* at 213. Powell enumerated the lower courts' factors for curtilage boundaries that produced this concession: "because of the close proximity of the yard to the house, the nature of some of the activities" conducted there, and because Ciraolo "had taken steps to shield those activities from the view of the passersby." *Id.* at 222 (Powell, J., dissenting).
86. Florida v. Riley, 488 U.S. 445, 451–52 (1989) (White, J., plurality opinion).

the knowing exposure theory could be applied to other curtilage scenarios where police imitated the conduct of curious passersby. Maybe the Court meant to encourage lower courts to go further, and allow police officers to climb utility poles or perch on passing trucks, in order to cheat the ground-level boundary rules against manipulating plain view opportunities to observe the curtilage. However, the Court made no allusion to the significantly increased enforcement efforts to root out homegrown marijuana production, starting in the late 1970s at the time when successful eradication in Mexico suddenly opened a market for domestic cultivation of the drug.[87] At least for the *Ciraolo* majority, expectation analysis did not include express consideration of law enforcement needs to escape the burdens of Fourth Amendment scrutiny because of the difficulties attendant in complying with the warrant requirement. The burden was on Ciraolo to persuade the Court to recognize his Fourth Amendment privacy as a privilege. It was not a right.

III. THE BACK STORY FOR *CIRAOLO*: REFRAMING CURTILAGE AS A PROTECTION OF EXPECTATIONS

The first defining moment that marked the beginning of the back story for *Ciraolo* was the silence of the *Katz* opinion in explaining how pre-*Katz* doctrines, such as those protecting curtilage-home privacy, should be interpreted after the physical trespass concept was abandoned as a general requirement for searches and seizures. Until *Katz*, the Supreme Court treated curtilage-home privacy issues as an uncontroversial part of the river of lower court Fourth Amendment interpretations that could be left to roll along undisturbed. But the rhetoric of the *Katz* opinion displayed a confusing blend of caution and overstatement. The overstatements, taken literally, could have been taken to imply that the protection of dwelling and curtilage should be abandoned, because the Fourth Amendment should protect "people, not places," and because a "constitutionally protected area" was not a useful concept.[88] It seemed more sensible to infer that Justice Stewart's language expressed only excessive enthusiasm for the death knell of the physical trespass requirement, and perhaps an overly

87. Brendan Peters, Note, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 STAN. L. REV. 943, 964 & nn.128–33 (2004). By 1986, Americans produced "up to half of the marijuana consumed domestically." *See id.* at 964 n.129. Several amicus briefs argued that the value of curtilage flyovers in anti-marijuana enforcement programs justified the rejection of the privacy claim in *Ciraolo*.

88. Katz v. United States, 389 U.S. 347, 351 n.9, 353 (1967).

defensive attitude toward the reversal of precedent. But after the Court adopted the vocabulary of "expectations" to describe the *Katz* privacy requirements,[89] it seemed especially important for guidance to be provided as to how that vocabulary should be used to express the harms caused by invasions of curtilage-home privacy, now stripped of the unnecessary appendage of physical trespass. This translation of expectations was difficult for some observers to envision, because the idea of trespass was stuck like glue to their visions of a police officer walking across a curtilage boundary, and because the idea of property was similarly stuck to the curtilage land.[90]

One source of inspiration could have been the law of burglary that gave rise to the curtilage concept before it became attached to the Fourth Amendment. By analogy, the police officer in a post-*Katz* world could have been reimagined as a Fourth Amendment intruder who violated the security and freedom of a home dweller. The burglary-based origins of curtilage could have been used to rub off the glue of trespass from the feet of officers treading upon the lawn next to a dwelling. At common law, the object of punishing burglary was "not to prevent trespasses,"[91] but to punish entries that might frighten persons who might be present, because any intruder's entry could signal danger.[92] Admittedly, the crime included extraneous elements, requiring the night-time breaking and entry of dwellings or curtilage structures.[93] But in spite of these technicalities, the burglary crime served to illustrate how the concept of a protected area could be intertwined with the protection of expectations of privacy.

Moreover, even before *Katz*, the Fourth Amendment version of the curtilage concept was more expansive than the burglary concept, and encompassed the police crossing of the curtilage boundary to inspect visually whatever might be on the curtilage land. This fifth wall of a dwelling established its value as a necessary barrier to police intrusion based on the "domestic activities" of the home dwellers that might occur within its confines. Those activities continued in a different form, after

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89. *See* David A. Sklansky, *Back to the Future:* Kyllo*,* Katz*, and Common Law*, 72 MISS. L.J. 143, 156–57 (2002) (noting that the Court "lost little time" in retroactively validating Justice Harlan's "gloss" from his *Katz* concurrence in *Terry v. Ohio*, 391 U.S. 1 (1968)).

90. *Compare* Bender, *supra* note 67, at 736–38 (noting descriptions of curtilage as property concept), *with* United States v. Dunn, 480 U.S. 294, 300 n.3 (1987) (recognizing burglary roots of curtilage concept).

91. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 74 (Mark DeWolfe Howe ed., 1963) (1881).

92. WILLIAM BLACKSTONE, 4 COMMENTARIES *223 (explaining that burglary is a heinous crime because "of the abundant terror that it naturally carries with it" as a "forcible invasion and disturbance of [the] right of habitation").

93. *See* Bender, *supra* note 67, at 731–33.

the passing of the era when "the kitchen, the laundry, the springhouse, the woodshed, and most particularly the 'outhouse'" were not to be found "within the four walls" of houses.[94] After *Katz*, it should have been easier to see that the feet of police officers on the lawn had always been covered with the intangible mud of expectations, and easier to explain how the curtilage idea was designed to protect "people" and their privacy rather than land per se.

The second defining moment for the back story of *Ciraolo* occurred when lower courts decided to take different directions in their struggle to envision curtilage-home privacy violations as translatable into terms that expressed Katzian values. These directions demonstrated confusion. For example, one court stopped referring to curtilage when discussing privacy expectations in backyards, while others noted that curtilage boundaries would be at least relevant in determining the reasonableness of an expectation.[95] Another direction illustrated the willingness of some courts to use expectation analysis to expand Fourth Amendment protection to "closed woods" as a special category of the open fields land that lay beyond the curtilage. These courts relied on the theory that a home dweller might seek to preserve the wooded area as private, just as Katz closed the door of his phone booth.[96]

The *Oliver* opinion by Powell sought to wipe out one stream of confusion by implying in dicta that positive conclusions about reasonable privacy expectations were, indeed, expressed in the definitions of curtilage boundaries established in pre-*Katz* lower court decisions. But Powell supplied no particulars of those definitions until his *Ciraolo* dissent named the factors used in the decisions cited in *Oliver*; perhaps he assumed that the longstanding factors were so familiar to lower courts as to require no repetition. In *Ciraolo*, Powell recognized that the Court was rejecting aerial curtilage protection before it had even endorsed a definition of ground curtilage, and so he listed the lower court factors to

94. S. Brian Lawrence III, Comment, *Curtilage or Open Fields?:* Oliver v. United States *Gives Renewed Significance to the Concept of Curtilage in Fourth Amendment Analysis*, 46 U. PITT. L. REV. 795, 813 n.101 (1985) (quoting Judge Charles E. Moylan, Jr., *The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?,"* 1977 S. ILL. U. L.J. 75, 87). An important modern issue in curtilage doctrine is how to apply similar protections to urban dwellings. *See* Carrie Leonetti, *Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas*, 15 GEO. MASON U. CIV. RTS. L.J. 297 (2005).

95. *See* Bender, *supra* note 67, at 737–38 nn.68–77 (citing cases).

96. *See* Lawrence, *supra* note 94, at 804–05 & nn.73, 74.

fill that vacuum.[97] His *Oliver* opinion also shut off the stream of protection for closed woods in the open fields, pronouncing all open fields unprotected, whether open in a literal sense or not.[98] But *Oliver* arrived too late and said too little to provide guidance concerning the applicability of non-curtilage expectation precedents to the problem of aerial curtilage protection. During the era between *Katz* and *Oliver*, some of Justice Stewart's statements in *Katz* had been transformed into new rhetoric for the restriction of privacy rights.[99] The precedential landscape and rhetoric of the *Ciraolo* opinions were significantly affected by the Court's delay in waiting until *Oliver* to discuss the character of home-curtilage privacy protection in the post-*Katz* world.

By the time *Ciraolo* was argued, the third defining moment had ended, namely the era when lower courts grappled with the aerial surveillance problem. Their diversity of views suggested that if Justice Powell intended to imply in *Oliver* that the curtilage doctrines should be left intact, rather than revised with the dissolving fluid of non-curtilage precedents, that message had not been heard. Some lower courts adopted the opposing positions later espoused by Powell and Burger, while others worked at compromise, by attempting to distinguish between lawful aerial police observations that resembled those of a hypothetically "reasonably curious passerby" in the sky, and unlawful observations resembling those of an "unreasonably curious passerby" in that location.[100] By this time, the byword for the manifestation concept had become a requirement to take "normal precautions" to maintain privacy.[101] Some judges assumed that the manifestation element in an aerial case should require more than a simple finding of curtilage status. If these judges had looked to *Oliver* for guidance on this point, they would have noticed that it was only Justice Marshall's dissenting opinion that emphasized how some spaces like homes "are so presumptively private" that manifestation is

97. *Compare* California v. Ciraolo, 476 U.S. 207, 221 (1986) (Powell, J., dissenting) (citing cases relying on such factors as the existence of an enclosure around the potential curtilage area, the proximity of the area to a dwelling, the "nature of the uses to which the area is put," and the "steps taken . . . to protect the area from observation by people passing by"), *with* Oliver v. United States, 466 U.S. 170, 180 (1984) (same). *See also* United States v. Dunn, 480 U.S. 294, 301 (1987) (endorsing same factors used in *Ciraolo* dissent for defining curtilage boundaries).

98. *Oliver*, 466 U.S. at 178–84.

99. *See, e.g.*, United States v. Place, 462 U.S. 696, 706–07 (1983); United States v. Knotts, 460 U.S. 276, 280–85 (1983); Rawlings v. Kentucky, 448 U.S. 98, 104–05 (1980); Smith v. Maryland, 442 U.S. 735, 739–45 (1979); *see also Ciraolo*, 476 U.S. at 211, 213 (citing *Knotts*, *Rawlings*, and *Smith*).

100. *See* Bender, *supra* note 67, at 746–48.

101. *Rawlings*, 448 U.S. at 105.

unnecessary.[102] Yet even these judges took different directions, with some treating the failure to cover a backyard with a tent as a failure to take normal precautions, while others looked for a manifestation of ground privacy, such as a fence, before counting that as a manifestation transferable to the sky.[103] As it turned out, the Court did not adopt either type of manifestation requirement, but decided instead that a reasonable expectation of privacy from the type of surveillance in *Ciraolo* could not exist in an uncovered curtilage.

Almost twenty years after *Katz*, the *Ciraolo* opinions finally exposed the Court's own debate concerning the integration of curtilage-home privacy doctrines into the *Katz* expectation framework. In the long run, the impact of that debate, if it can be judged from the content of an FBI lecture to agents on rules for curtilage surveillance,[104] was to create a "highway in the sky" rule that has not undone the fifth wall of the curtilage boundary on the ground.[105] But the taboo against climbing a few feet of fence in Kansas does not stop an officer from scaling a forty foot tree in Maryland.[106]

IV. CONCLUSION: POWELL'S GARDEN IN LATER YEARS

Justice Powell retired one year after his *Ciraolo* dissent, and for the next decade, he often sat by designation on federal courts of appeals. It is tempting to speculate about how he would have voted in privacy cases if he had stayed on the Court.[107] Perhaps he would have persuaded

102. *Oliver*, 466 U.S. at 193 (Marshall, J., dissenting). *See also Ciraolo*, 476 U.S. at 220 (Powell, J., dissenting) ("[A] home is a place in which a subjective expectation of privacy virtually always will be legitimate . . . .").

103. *See* Bender, *supra* note 67, at 746 n.121 (citing cases).

104. Peters, *supra* note 87, at 965 n.135 (citing John Gales Sauls, *Curtilage: The Fourth Amendment in the Garden*, http://www.totse.com/en/law/justice_for_all/curtilag.html (last visited Sept. 5, 2007) (providing hypotheticals and discussion of curtilage rules; authored by a Special Agent and Legal Instructor at the FBI Academy)).

105. *See* Bender, *supra* note 67, at 747 (citing Williams v. State, 277 S.E.2d 923, 925 (Ga. Ct. App. 1981) (making highway in the sky analogy)).

106. *Compare* State v. Waldschmidt, 740 P.2d 617, 623 (Kan. Ct. App. 1987) (reasoning that "the curtilage doctrine would be meaningless" if a public vantage point under *Ciraolo* could be obtained by climbing a nearby fence), *with* Kitzmiller v. State, 548 A.2d 140, 143 (Md. Ct. Spec. App. 1988) (distinguishing impermissible ladder climbing from permissible tree climbing that produces airplane-type view like *Ciraolo* flyover).

107. *See* JEFFRIES, *supra* note 15, at 556–57 (comparing Kennedy's votes to those Powell might have cast). Even if Powell had remained on the Court from 1987 until his

Justice O'Connor to make his *Ciraolo* dissent into a majority rule, if he could have encouraged her skepticism about the frequency of public air travel at 400 feet.[108] Perhaps he would have provided the fifth vote for the protection of a privacy expectation in garbage located on the sidewalk outside the curtilage,[109] because he would have recognized how the knowing exposure theory, once endorsed, might travel irresistibly into the curtilage.[110] It is difficult to know what he would have thought about knock and talks, those pretextual visits by police officers who use a driveway or curtilage path to gain access to a front door in the manner of a social visitor. He might have approved of police imitations of the brief contacts of typical door-to-door solicitors; but he would have recognized that his own risk analysis in *Ciraolo* suggested that police officers bring entirely different risks to the front door than a neighbor who comes to borrow a cup of sugar.[111] He joined the Court's opinion holding that a dog sniff of luggage in a public place is not a search,[112] but he might have had qualms about the use of narcotics-detection dogs to sniff at cars during traffic stops.[113] It is hard to imagine that he would have approved of the tactic of bringing these dogs inside the curtilage or up to a front door during a knock and talk.[114] Moreover, if Powell's willingness to protect containers such as luggage, whether in public or when placed in cars,[115] is any guide, he would have agreed with the Court's invalidation of luggage squeezes.[116]

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death in 1998, he would not have voted in the cases discussed in the text at notes 113, 116 & 117 *infra*.

108. *See* Florida v. Riley, 488 U.S. 445, 452, 455 (1989) (O'Connor, J., concurring in the judgment).

109. *See* California v. Greenwood, 486 U.S. 35, 39–42 (1988).

110. *See generally* Mark C. Anderson, Note, United States v. Redmon*: The Demise of Curtilage in Fourth Amendment Determinations? A Study of Garbage Searches on Common Property*, 9 WIDENER J. PUB. L. 61, 71–98 (1999) (analyzing expansion of *Greenwood*).

111. *See* Vanessa Rownaghi, Comment, *Driving Into Unreasonableness: The Driveway, the Curtilage, and Reasonable Expectations of Privacy*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1165, 1175–88 (2003) (comparing lower court interpretations of differences between curtilage analysis and *Katz* expectation analysis of police use of driveways and paths to enter curtilage).

112. *See* United States v. Place, 462 U.S. 696, 706–07 (1983).

113. *See* Illinois v. Caballes, 543 U.S. 405, 408–11 (2005).

114. *Compare* State v. Davis, 711 N.W.2d 841, 845 (Minn. Ct. App. 2006) (holding dog sniff of apartment door in a common hallway is not a Fourth Amendment search but is a search under the state constitution), *with* State v. Rabb, 920 So.2d 1175, 1184 (Fla. Dist. Ct. App. 2006) (holding dog sniff of the front door of a house is a Fourth Amendment search). *See also* Evan B. Citron, Note, *Say Hello and Wave Goodbye: The Legitimacy of Plain View Seizures at the Threshold of the Home*, 74 FORDHAM L. REV. 2761, 2786–808 (2006) (comparing "voluntary exposure" and "sanctity of the home" theories endorsed in conflicting lower court precedents).

115. *See* Arkansas v. Sanders, 442 U.S. 753, 758–65 (1979) (Justice Powell writing for majority), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991); United States v.

It seems very likely that Justice Powell would have approved of the *Kyllo* decision, which recognized that police conducted a "search" when they directed a heat scanner at the walls of a home. The *Kyllo* Court shared Powell's respect for the value of maintaining the "preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[117] The *Kyllo* opinion echoed Powell's commitment to establish doctrinal protections against future stealthy encroachments upon the core Fourth Amendment rights of home privacy.[118] Powell's *Ciraolo* dissent advocated a form of curtilage protection that eerily resembled *Kyllo*'s protection of the home from surveillance methods used to obtain information "that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area.'"[119] So would Powell have objected to the thermal imaging device, which was aimed from outside the curtilage in *Kyllo*, but then have allowed police the unregulated power to stand outside the curtilage and peer into the nearby windows of a dwelling, if the "public vantage point" of the police position seemed fictional?[120]

Powell was a Justice who virtually never dissented in Fourth Amendment cases, but that may have been because he preferred not to dissent at all. His willingness to keep company in *Ciraolo* with the ideas of Justices Brandeis and Murphy, and his commitment to a dialogue that expressed the lived experience of the intangible harms of police surveillance, made his *Ciraolo* dissent one for the ages.

Chadwick, 433 U.S. 1, 6–13 (1977) (joining Court majority), *abrogated by* California v. Acevedo, 500 U.S. 565 (1991).

116. *See* Bond v. United States, 529 U.S. 334, 336–39 (2000).

117. Kyllo v. United States, 533 U.S. 27, 34 (2001).

118. *See id*. at 34–36 (observing that Fourth Amendment definition of searches and seizures "must take account . . . of sophisticated systems" of thermal imaging technology "in development"); *see also id.* at 31 (citing recognition of home privacy as core right in *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

119. *Id*. at 34.

120. Even the act of peering into windows from outside a curtilage may constitute a search if the officer no longer occupies a public vantage point. *See* State v. Carter, 569 N.W.2d 169, 177–78 & n.12 (Minn. 1997), *rev'd*, 525 U.S. 83 (1998) (finding it unnecessary to determine whether this kind of window peering would be a search because the defendants were temporary occupants who had no legitimate expectation of privacy in the premises).